

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHAU HOANH NGUYEN
Claimant

VS

IBP, INC.
Respondent

Self-Insured

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DOCKET NO. 180,491

ORDER

On February 9, 1995, the Appeals Board heard respondent's request to review the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on December 2, 1994. Ernest Johnson has been appointed Board Member Pro Tem for this docketed appeal to serve in place of Board Member Gary Korte who recused himself from this proceeding.

APPEARANCES

The claimant appeared by and through his attorney, Gary E. Patterson of Wichita, Kansas. The respondent appeared by and through its attorney, Paula S. Greathouse of Emporia, Kansas. There were no other appearances.

RECORD

The record consists of the transcript of the Regular Hearing, dated July 15, 1994; the continuation of the Regular Hearing, dated August 10, 1994; the continuation of the Regular Hearing, dated August 12, 1994; the deposition of Jerry Hardin, dated August 10, 1994; the deposition of Lawrence R. Blaty, M.D., dated August 11, 1994; the deposition of John B. Moore IV, M.D., dated August 22, 1994; the exhibits offered into evidence by the parties; and the pleadings and correspondence contained in the administrative file.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Special Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Special Administrative Law Judge found claimant entitled to permanent partial general body disability benefits based upon a seventy percent (70%) work disability. The respondent appeals from the findings of the Special Administrative Law Judge and requests the Appeals Board review the findings of compensability of the left shoulder injury, timely written claim, personal injury by accident arising out of and in the course of employment, nature and extent of disability, future medical and vocational rehabilitation. Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

(1) Claimant is entitled to receive permanent partial general disability benefits based upon the eight percent (8%) impairment of function rating provided by Dr. Lawrence R. Blaty.

There is no dispute that claimant developed compensable injuries to his left middle and ring fingers, with an etiology from respondent's records, of repetitive motion. On January 23, 1991, claimant first complained of problems in his left hand up to his shoulder. Claimant continued to work, and, while the shoulder apparently improved, the left hand continued to be a problem. The parties stipulated that the date of accident regarding the series of events for the hand injuries, for the purpose of the regular hearing, was August 25, 1992. On September 18, 1992, respondent's records indicate that claimant again complained of problems in the left shoulder.

Dr. John B. Moore, the certified hand surgeon authorized by the respondent, eventually performed a successful trigger finger release on both the injured fingers on January 6, 1993. Claimant returned to work approximately one week later; although, his return was subject to the restriction by Dr. Moore that he not use his left hand. Claimant was released to return to full duties by Dr. Moore, without restrictions, at least by April 2, 1993. Testimony indicated that claimant had been doing unrestricted work for several weeks prior to that formal release.

Although claimant continued to have hand problems, he did continue to work into April, 1993. However, claimant failed to call in sick when he missed work on April 14, 1993, and he missed several days thereafter without excuse. Claimant was then terminated on April 21, 1993 for violation of the respondent's attendance policy.

The claimant was rated by Dr. Moore on October 22, 1993. Dr. Moore gave the claimant a ten percent (10%) disability to the hand with no restrictions. Dr. Moore's records contain no mention of a shoulder problem, nor could he recall any reference made to him by claimant of any problem in the shoulder.

Dr. Lawrence R. Blaty saw claimant on August 25, 1993 at the request of claimant's attorney. Dr. Blaty found disability in the third and fourth fingers of the left hand and also in the left shoulder. Because of those injuries he rated claimant's overall disability as eight percent (8%) to the body as a whole.

Claimant testified that he experienced left shoulder problems shortly after his left hand was hurt and that he continued to complain of left shoulder problems to his supervisors, the nurses and Dr. Moore thereafter. He further testified that if he could find a job he could work if it were not for the lack of a car and the language problem.

Jerry Hardin conducted an assessment for work disability purposes for claimant. He opined that, based on the restrictions recommended by Dr. Blaty, claimant has lost eighty to eighty-five percent (80-85%) of his ability to perform work in the open labor market.

The Appeals Board finds that the claimant has met his burden of proof that he suffered compensable injuries to his left hand and left shoulder. However, he has failed to sustain his burden in proving that he is entitled to an award for work disability. Claimant returned to work shortly after his surgery in January, 1993 and earned a comparable wage until his termination April 24, 1993. He further testified that he was able to work and was not working for reasons other than his injuries. The Appeals Board concludes that pursuant to K.S.A. 1992 Supp. 44-510e, the presumption of no work disability applies in this case. The statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform

work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The claimant has testified that while he did have pain, he did perform the required work for the respondent. The presumption of no work disability is rebuttable, but in this case the Appeals Board finds that the credible evidence does not rebut the presumption. See Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993). Since the presumption applies, the claimant's disability, if any, is limited to the percentage of functional impairment. See Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

With respect to functional impairment, Lawrence R. Blaty, M.D., was the only physician to provide a rating that included claimant's shoulder injury. In accordance with the AMA Guides, Third Edition, Revised, Dr. Blaty opined that the claimant had an eight percent (8%) whole body functional impairment as a result of his work-related accidental injury to his left hand and shoulder.

It is the finding and conclusion of the Appeals Board the claimant had returned to comparable wage employment; the presumption of no work disability has not been rebutted; therefore, the claimant is entitled to an award based on functional impairment of the whole body in the amount of eight percent (8%).

The Appeals Board further incorporates herein the findings of Special Administrative Law Judge William F. Morrissey as set forth in his Award dated December 2, 1994 to the extent that they are not inconsistent with the findings and conclusions expressed in this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on December 2, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Chau Hoanh Nguyen, and against the respondent, IBP Inc., for an accidental injury which occurred August 25, 1992 and based upon an average weekly wage of \$425.68, for 0.71 weeks of temporary total disability compensation at the rate of \$283.80 per week in the sum of \$201.50, followed by 414.29 weeks at the rate of \$22.70 per week or \$9,404.38 for an 8% permanent partial general disability, making a total award of \$9,605.88.

As of July 9, 1995, there is due and owing claimant 0.71 weeks of temporary total disability compensation at the rate of \$283.80 per week or \$201.50, followed by 149 weeks of permanent partial disability compensation at the rate of \$22.70 per week in the sum of \$3,382.30, for a total of \$3,583.80 which is ordered paid in one lump sum, less any amounts previously paid. The remaining balance of \$6,022.08 is to be paid for 265.29 weeks at the rate of \$22.70 per week, until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the director. Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed to the respondent to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Braksick Reporting Service Transcript of Regular Hearing	Unknown
Appino & Biggs Reporting Service Continuation of Regular Hearing (8-10-94)	\$280.80
Continuation of Regular Hearing (8-12-94)	\$ 57.30
Gene Donginoff Associates Deposition of John B. Moore IV, M.D.	\$254.00
Barber & Associates Deposition of Lawrence R. Blaty, M.D.	\$149.00
Deposition of Jerry D. Hardin	\$259.00

IT IS SO ORDERED.

Dated this ____ day of July 1995.

BOARD MEMBER PRO TEM _____

BOARD MEMBER _____

BOARD MEMBER _____

cc

Gary E. Patterson, Wichita, KS
Greg Coffey, Dakota City, NB
William F. Morrissey, Special Administrative Law Judge
David Shufelt, Acting Director